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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

MARC TOSCA,

Plaintiff and Appellant,

v.

BRIGHAM & GAUSTAD et al.,

Defendants;

JOSEPH PIASTA,

Respondent.

A106884

(Mendocino County  
Super. Ct. No. CV83255)

In April of 2000 Marc Tosca filed a complaint against individuals and law firms for professional negligence. A discovery dispute concerning a number of videotapes led the court to appoint attorney Joseph Piasta as a referee pursuant to Code of Civil Procedure section 639, subdivision (a)(5) in August of 2001. Tosca was “ordered to deliver to the referee . . . all of the originals of the recordings tapes” so that Piasta could oversee the making of copies of the tapes. On the subject of “Compensation,” the appointment order provided: “The referee shall be paid at the maximum hourly rate of \$200.00. The referee shall account generally for his time in increments of not less than 0.10 hours. All expenses that may be incurred in the copying of the tape recordings shall be charged to defendants. All charges for the referee’s time shall be charged to Plaintiff.”

The path of the reference was far from smooth. More than a year would go by until the referee filed his report and recommendations with the court in late October of

2002. The referee recounted how, after copies had been made, Tosca disputed that all originals of the tapes had been returned to him. The referee detailed his request for compensation by explaining the time expended by himself and his paralegal: “This represents approximately 3.5 hours of my time at \$200 per hour (\$700), and 12.10 hours for Ms. Gorlick’s time at \$85.00 per hour (\$1,028.50), [f]or a total of \$1,728.50.” Mr. Tosca filed opposition, claiming that the referee was engaging in “creative billing” in computing his fees.

No action was taken on the referee’s report for the better part of 2003. The reason appears to be that the court declined to act in the absence of the referee, who had been called up for eight months of active duty as an Army Judge Advocate General in the run-up to the recent Iraqi war.

The referee’s report, and Tosca’s objections thereto, were the subject of a hearing conducted on May 21, 2004. Both Mr. Tosca and referee Piasta were present. The court opened the hearing by stating: “I have received fairly voluminous documents concerning the referee’s expenses” and “I conclude that the requested fees of Mr. Piasta, which I understand is \$1,728.50 . . . that is an appropriate sum. It does reflect a reasonable number of hours spent. As a matter of fact, it seems to me it’s a discounted amount . . . and so I am going to . . . order Mr. Tosca . . . to make that payment within ten days.”

Mr. Tosca addressed the court: “All I’m asking for is an invoice, an accounting [for] the \$1,700 . . . . I will appeal the decision because I think asking for an invoice from an attorney to account for his hours—because there’s no way she [i.e., paralegal Gorlick] could have spent ten hours or twelve point five hours making copies. Again, I do have—I will appeal your decision. I don’t think it’s fair.” The court then asked Mr. Piasta to describe “the nature of your role in this matter,” which Piasta did in some detail. He concluded, “Your Honor[,] you should have in there in that stack of papers a detailed accounting.” The court then ended the hearing by noting: “Mr. Tosca, I do have a document that does appear to me to provide the information that you seek. It, in fact, is a public record. There’s no reason why you couldn’t review it and determine for yourself

that the amount that has been requested is an appropriate amount. If you choose to appeal . . . you may do so.”

Tosca filed a notice of appeal before an actual order was filed. Pursuant to the principle that a notice of appeal is to be liberally construed in favor of its sufficiency, Tosca’s notice will be treated as commencing a valid, if premature, appeal from the order subsequently signed. (Cal. Rules of Court, rules 1(a)(2), 2(d).) The order is appealable as the final determination on a collateral matter directing the payment of money. (*In re Marriage of Skelley* (1976) 18 Cal.3d 365, 368.)

The majority of Tosca’s arguments are directed against Piasta’s performance of his duties as referee, arguments which the trial court “failed to hear and consider.” Tosca is, in other words, arguing the merits of how Piasta had discharged his duties to oversee the copying of the tapes. But the merits had become moot because the parties settled the case six months before the hearing took place. One of the provisions of the settlement was that the tapes would be turned over to the court, which Piasta did prior to the hearing. In light of these developments, the sole issue before the court was Piasta’s compensation.

The trial court had discretion to fix the amount of referee Piasta’s compensation. (Code Civ. Proc., § 1023.) “An abuse of discretion is never presumed and it must be affirmatively established.” (*Wilder v. Wilder* (1932) 214 Cal. 783, 785.) It is Tosca’s burden as the appellant, to establish that the trial court exceeded the bounds of reason in fixing the amount of the referee’s compensation. (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478-479; *Denham v. Superior Court* (1970) 2 Cal.3d 557, 566.) It is clear from the court’s remarks at the hearing that it had before it adequate documentation substantiating the referee’s request for compensation. In the absence of proof to the contrary, we must presume that such documentation does in fact exist and that it would support the trial court’s decision. (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.) The record on appeal, which was prepared by Tosca, does not include any of that documentation. It thus appears that Tosca has failed to sustain his burden of demonstrating error by a sufficient record. (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 574-575; *Denham v. Superior Court, supra*, at p. 564.)

In light of this conclusion, only one of the additional arguments presented by the parties needs to be addressed. That exception is Piasta's request that Tosca be assessed sanctions for a frivolous appeal. The request is denied because it is not made in the form specified by rule 27(a) of the California Rules of Court.

The order is affirmed.

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Kay, P.J.

We concur:

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Reardon, J.

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Sepulveda, J.